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Adjudicating mentally disordered offenders in Ghana: The criminal and mental health legislations

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ABSTRACT

The involvement of mentally disordered offenders (MDOs) in the criminal justice system (CJS) is currently a major public health concern. This has culminated in several empirical researches over the years, with a particular focus on addressing the problem. The present study examines the criminal and the mental health legislations available to offenders raising fitness to stand trial issues, as well as those pleading insanity at the time of the offense (insanity defense) in Ghana. The legislations are examined within a framework of reducing the overrepresentation of MDOs in the CJS. In doing so, comparisons are made to similar legislations in other commonwealth jurisdictions, when necessary. Regarding fitness to stand trial, it is evident that the Ghanaian legislation does not contain discrete fitness indicators, relative to, for instance, Canada. Yet, it is interesting that the terminologies 'unsound mind' and 'incapable of making a defence' used in the proviso convey similar meaning and requirements to those used in other jurisdictions. The insanity defense standard, on the other hand, is also heavily influenced by the M'Naughton Rules in England. The defense consists of two separate cognitive tests, each of which can result in an acquittal. One of the tests strictly emphasizes knowledge of the nature and consequences of the act while knowledge of the wrongness of the criminal act is implied in the other. However, none of the tests takes into consideration uncontrollable impulse arising from mental disorder. The study proposes some revisions and amendments to the insanity legislation in its current formulation. Recommendations are also offered for critical areas that warrant research attention in relation to MDOs in Ghana, and in Africa as a whole.

1. Background

Criminal offenders can be categorized broadly into mentally disordered offenders (MDOs) and non-mentally disordered offenders (NMDOs), depending on their mental health states. The needs of MDOs span the boundaries of the criminal justice system (CJS) and the mental health system (MHS).The group of offenders characterized as MDOs vary widely across the literature. Some researchers construed MDOs as offenders found incompetent to stand trial or not guilty by reason of insanity (Renzaglia, Vess, Hodel, & McCrary, 2004), or offenders whose mental disorders are linked to their crime (Prior, 2007). This study refers to MDOs as individuals at the different stages of the CJS who are in need of mental health or psychiatric interventions. This is intended to capture offenders whose crimes are linked to their mental illness (insanity defense), those who are unfit to stand trial as a result of mental illness, and, finally, prisoners with mental illness. The present study examines the statutes relating to the processing of MDOs through the CJS and the MHS in Ghana, and is limited to fitness to stand trial (also known as adjudicative competence, competence to stand trial in USA; fitness to plead in England and Wales, Australia, and New Zealand; fitness for trial in Canada), and insanity at the time of the offense (insanity defense) for the following reasons. Firstly, they are among the most discussed and contested psycholegal constructs in the literature. Secondly, they have better codified legislations than any other psycholegal constructs in Ghana. Lastly, and most importantly, because these constructs are instituted not only to ensure due process rights but also to promote the diversion of MDOs from the CJS to the MHS, it will be relevant to examine their applications in Ghana, where no empirical data exist.

Ghana was a British colony until 6th March, 1957 when the country became the first West African country to gain independence from colonial masters. As a result, the legislations in Ghana are influenced largely by the British enactments, although some revisions and amendments have been made to the satutes since the time of independence. Ghana is one of the fastest growing economies in sub-Saharan Africa, and is presently a middle income country (Roberts, Mogan, & Asare, 2014). The population had increased tremendously from about 19 million in 2000 to 25 million (30.4% increase), and is currently (2014) projected at 27,043,093 million (Ghana Statistical Services, 2012, 2014). It is argued that the increasing population and socioeconomic pressures

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commonly observed in emerging economies will predispose many to mental health problems. In 2007, the World Health Organization (WHO) estimated that about 650,000 people in Ghana had severe mental disorders, whereas 2,166,000 people had mild to moderate mental disorders (WHO, 2007). Although epidemiological studies on the prevalence of mental illness are sparse, a study estimated that nearly 20% of the participants have moderate to severe psychological distress, an estimate higher than what was reported among Australians (11%) (Sipsma et al., 2013). Based on the estimates, there is the likelihood that some individuals committing crimes and/or who are being processed through the CJS may be afflicted with mental illness. This also provides the impetus to examine the legislations bothering mental illness and criminal activities, as this may help formulate and implement policies to ensure that MDOs are not overrepresented in the CJS.

There are three important legislations concerning how MDOs are dealt with in Ghana. The first is the Criminal Offences Act, 1960 (Act 29; henceforth Act 29) which contains information on the various criminal offenses, as well as defenses. In this regard, Act 29 deals with the insanity defense. The second legislation, the Criminal and Other Offences (Procedure) Act, 1960 (Act, 30; henceforth Act 30), also deals with the procedures for processing defendants via the CJS. Act 30 therefore addresses the procedural issues for defendants alleging unfit to stand trial, as well as those claiming insanity at the time of the offense. Finally, the Mental Health Act, 2012 (Act 846; henceforth Act 846) provides the legal framework for the organization and the provision of mental health care in Ghana. Act 846 was passed in 2012 after several years of discussions, deliberations and lobbying. The hitherto unenforced Mental Health Act, 1972 (NRCD 30) was repealed by Act 846. In this context, the legislation emphasizes the provision of mental health care to offenders with mental health needs at different stages of the CJS. In line with other jurisdictions, the concept of diversion is well articulated, and the objective is to ensure that the MDOs receive urgent and appropriate treatment. The institutions required to divert are the police, the courts, and the prisons. Act 846 recognized the following different stages where diversion can occur: (1) during police involvement; (2) before trial; (3) at trial; (4) at sentencing; and (5) after sentencing. In sum, the three main legislations concerning offenders with mental illness are Acts 29, 30, and 846.

Over the years, the literature on fitness to stand trial and insanity defense has been dominated by scholarships from Western countries, such as Canada (Desmarais, Hucker, Brink, & De Freitas, 2008), Australia (Wondemaghen, 2014), and the United States (Ferranti, McDermott, & Scott, 2013). However, this trend is gradually changing as recent years have also seen similar outputs from developing countries, including China (Zhao & Ferguson, 2013); Malaysia (Fong et al., 2010), Argentina (Folino & Urrutia, 2001), Brazil (Taborda, 2001), Chile (Cid, 2010), Zimbabwe (Menezes, Oyebode, & Haque, 2007), South Africa (Nair & Wessels, 1992), and Iraq (Muslim & Chaleby, 2007). Contributions from these countries have undoubtedly proffered more and deeper insights into the differences in the conceptualizations of the above psycholegal constructs, and also how the CJSs in different jurisdictions operate. The diverse literature would provide the opportunity for comparative analysis of the relevant legislations. This may be particularly useful to researchers and professionals who may be interested in comparative and/or cross-border forensic psychology and psychiatry. Such endeavors may also have policy implications such as creating awareness and/or renewing interests to refine or review the existing laws on mental illness and criminal defendants. Presently, empirical analysis of the legal provisions that are instituted for adjudicating MDOs is nonexistent in Ghana, hence the current study addresses this research lacuna. The legislations would be examined and when necessary comparisons with similar legislations from commonwealth countries (e.g., Australia, Canada, Kenya, Tanzania, and United Kingdom) would be undertaking. This can also help understand how the laws of Ghana are compared to other commonwealth countries, since the legislations in majority of these countries are influenced largely by English enactments (e.g., the insanity defense; see Yeo, 2008; Zhao & Ferguson, 2013).

The manuscript is organized into two sections. The first section examines fitness to stand trial since it is a procedural issue. Next, the study examines insanity at the time of offense as a defense issue. Brief discussion and recommendations will be offered.

2. Criminal procedural issues for fitness to stand trial

Fitness to stand trial is a legal concept providing for the postponement of criminal proceedings for defendants who are not able to participate in and contribute to their own defense, particularly due to mental disease (Zapf, Roesch, & Pirelli, 2014). It is frequently and substantially raised more often than the insanity defense. In the USA, some analysts estimated that about 60,000 adjudicative competence evaluations are requested annually (Bonnie & Grisso, 2000), with an estimated $300 million annual expenditure (Zapf et al., 2014).

The essence of fitness to plead was summarized by Lord Edmund-Davies in R vs. Podola (1960) in Britain as "no man may be brought to trial upon any criminal charge unless and until he is mentally capable of fairly standing trial" (cited in Rogers, Blackwood, Farnham, Pickup, & Watts, 2008, p. 576). Largely influenced by the English common law, the fitness provision in Ghana also allows for arraignment, trial, and judgment of defendants to stay if there are indications of unsoundness of mind. According to Act 30 Section 133 (1) "Where in the course of a trial or preliminary proceedings the Court has the reason to believe that the accused is of unsound mind and consequently incapable of making a defense, it shall enquire into the fact of such unsoundness by causing the accused to be medically examined and shall after the examination take medical and any other available evidence regarding the state of the accused's mind" (cited in Mensa-Bonsu, 2009, p. 76). The processes involved in determining whether defendants are fit, or otherwise, include the following: (1) raising the question and requesting for fitness examination; (2) the fitness evaluation stage; (3) judicial determination of fitness or unfitness; (4) disposition and provision of treatment to unfit defendants; and (5) rehearings on fitness of unfit defendants, or release of unfit defendants (see also Grisso, 2003). When the defendants raise the fitness issue, the court makes a request for mental health professionals, preferably psychiatrists, to conduct the fitness evaluation (the evaluation process is beyond the scope of the present study). The court is then furnished with the assessment reports to assist in determining the defendants' fitness status. Criminal proceedings are commenced or continued for those found fit to stand trial. However, unfit defendants are treated differently, as discussed below (see the section on disposition and release).

What concerns most researchers and professionals alike is the meaning of fitness to stand trial. Stated differently, what indicates whether a defendant is fit or not fit to stand trial? In England and Wales, fitness to plead is determined based on the *Pritchard* criteria (1836). The criteria are (1) ability to plead; (2) ability to understand evidence; (3) ability to understand the court proceedings; (4) ability to instruct a lawyer; and (5) knowing that a juror can be challenged (Rogers et al., 2008). The *Presser* criteria that are used to determine fitness to stand trial in Australia are"(1) ability to understand the charge; (2) ability to plead to the charge and exercise the right to challenge; (3) understanding of the basic nature of proceedings; (4) ability to follow the course of proceedings in broad terms; (5) ability to understand the substantial effect of any evidence and be able to make a defense or answer to the charge, including the ability to instruct counsel; and (6) have sufficient capacity to be able to decide what defense strategy will be relied upon and make this known to the court and counsel" (White, Batchelor, Pulman, & Howard, 2012, p. 102). In Canada, fitness for trial requires the defendant to (a) understand the nature or object of the proceedings, (b) understand the possible consequences of the proceedings, or (c) communicate with counsel" (cited in Newby and Faltin, 2008, p.186).

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